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NOTES

AMPLIFYING *BOSE CORP. V. CONSUMERS UNION*: THE PROPER SCOPE OF DE NOVO APPELLATE REVIEW IN PUBLIC PERSON DEFAMATION CASES

INTRODUCTION

The Supreme Court's landmark decision in *New York Times Co. v. Sullivan*[1] dramatically changed the law of defamation[2] by requiring that a public official[3] prove actual malice[4] to recover damages.[5] After announcing the new constitutional requirement, the Court proceeded to decide the merits of the case instead of remanding to the trial court for a new trial.[6] The Court justified its independent review of the facts in part by citing its obligation to ensure the correct application of constitutional principles.[7] This concern has become the constitutional basis for de novo

1. 376 U.S. 254 (1964).

2. Prior to New York Times Co. v. Sullivan, no constitutional protection was afforded defamatory speech under the first amendment. *See* Beauharnais v. Illinois, 343 U.S. 250, 255-56 (1952). At common law, liability was established by a showing that a published statement was false, defamatory and "of and concerning" the plaintiff. *See* W. Keeton, Prosser & Keeton on Torts § 113, at 802 (5th ed. 1984). Proof of actual pecuniary loss was normally required. *See id.* § 112, at 794.

3. The actual malice requirement has been extended to "public figures." *See* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); *see also* R. Smolla, The Law of Defamation § 2.02[4], at 2-16 (1989) (*Butts* considered first case applying actual malice to public figures). For a recent discussion on the distinction between public and private figures, see Comment, *Private Lives and Public Concerns: The Decade Since* Gertz v. Robert Welch, Inc., 51 Brooklyn L. Rev. 425 (1985).

4. "Actual malice" denotes publication of a defamatory falsehood "with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964). "Reckless disregard" has been refined to mean both a "high degree of awareness of [the statement's] probable falsity," Garrison v. Louisiana, 379 U.S. 64, 74 (1964), and "that the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1968). Actual malice is a subjective standard reflecting the defendant's state of mind at publication and not an objective test of how a reasonable publisher in similar circumstances would act. *See id.*

5. *See Times v. Sullivan*, 376 U.S. at 279-80. In order to recover, the plaintiff must prove actual malice by clear and convincing evidence. *See* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 511 (1984); *Times v. Sullivan*, 376 U.S. at 285-86. This burden of proof is heavier than the "preponderance of the evidence" standard applicable in most civil proceedings. *See* Note, *The Future of Libel Law and Independent Appellate Review: Making Sense of* Bose Corp. v. Consumers Union of United States, Inc., 71 Cornell L. Rev. 477, 481 (1986).

6. *See Times v. Sullivan*, 376 U.S. at 284-86.

7. *See id.* at 285. In addition, the Court ruled on the merits in order to preserve judicial resources. *See id.* at 284.

Times v. Sullivan concerned an advertisement in support of the civil rights movement published in defendant's newspaper. *See id.* at 256-57. One commentator has suggested that the Court's motive for independent disposition of the case on appeal was the desire to avoid local prejudice on remand, which, it was feared, would emasculate the new constitutional protection and punish the defendant for its apparent support of civil rights

appellate review[8] of the actual malice determination in public person defamation actions.[9]

In 1984, the Supreme Court in *Bose Corp. v. Consumers Union of United States, Inc.*[10] explicitly affirmed its longstanding practice[11] of independently reviewing a trial court's actual malice determination. At issue was whether an appellate court was bound under Federal Rule of Civil Procedure 52(a)[12] to defer to a trial court's finding of actual malice. The Court concluded that Rule 52(a) was inapplicable to the actual malice decision and that "[a]ppellate judges . . . must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity."[13] The Court, in accord with *New York Times Co. v. Sullivan*,[14] also stated in dictum that the duty of independent appellate review applied with equal force to jury determinations of actual malice.[15]

Bose, however, left unresolved the scope of de novo review.[16] The Court was unclear as to which elements[17] of an actual malice finding are

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activists. *See* Lewis, New York Times v. Sullivan *Reconsidered: Time to Return to "The Central Meaning of the First Amendment"*, 83 Colum. L. Rev. 603, 608 (1983).

8. De novo review empowers an appellate court, through independent scrutiny of the established record, to come to a different conclusion than that of the trier of fact. *See* 1 S. Childress & M. Davis, Standards of Review: Federal Civil Cases and Review Process § 2.14, at 76 (1986). "Free," "independent" and "plenary" review are synonymous terms. *See id.*

9. *See* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 502 (1984); *supra* note 3.

10. 466 U.S. 485 (1984).

11. After *Times v. Sullivan*, the Court exercised independent appellate review in numerous cases without explanation. *See, e.g.*, Time, Inc. v. Pape, 401 U.S. 279, 291-92 (1971); St. Amant v. Thompson, 390 U.S. 727, 732-33 (1968); Curtis Publishing Co. v. Butts, 388 U.S. 130, 156-62 (1967).

12. At the time that *Bose* was decided, Rule 52(a) read in pertinent part: "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Fed. R. Civ. P. 52(a) (amended 1985). In 1985, the Rule was amended to read "[f]indings of fact, *whether based on oral or documentary evidence*, shall not be set aside . . . ." Fed. R. Civ. P. 52(a) (emphasis added).

13. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 514 (1984).

14. 376 U.S. 254 (1964)

15. *See id.* at 501; *see, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 256, 284-85 (1964) (de novo review required in cases tried by jury).

16. *See* Connaughton v. Harte-Hanks Communications, Inc., 842 F.2d 825, 841 (6th Cir.), *cert. granted*, 109 S. Ct. 257 (1988); Tavoulareas v. Piro, 817 F.2d 762, 776 (D.C. Cir.) (en banc), *cert. denied*, 108 S. Ct. 200 (1987); Wanless v. Rothballer, 136 Ill. App. 3d 321, 324, 483 N.E.2d 899, 902 (1985), *aff'd*, 115 Ill. 2d 158, 503 N.E.2d 316 (1986), *cert. denied*, 482 U.S. 929 (1987).

17. Any actual malice finding contains two elements: (1) the determination of historical facts, and (2) the making of a legal inference drawn from those facts.

Historical facts determine who did what to whom when, where and how. *See* Monaghan, *Constitutional Fact Review*, 85 Colum. L. Rev. 229, 235 (1985). They are case specific and determined without consideration of legal effect. *See* L. Jaffe, Judicial Control of Administrative Action 546-48 (1965). For example, in a defamation suit, whether a source provided a reporter particular information would be a historical fact. *See, e.g.*, Tavoulareas v. Piro, 759 F.2d 90, 108 (D.C. Cir. 1985), *rev'd on other grounds*,

deferentially reviewed and which are reviewed de novo. Federal and state appellate courts disagree: some independently review all elements of the actual malice determination[18] while others restrict de novo review to the legal inference of actual malice.[19] In addition, *Bose* offered little guidance on how an appellate court is procedurally to exercise its independent review.[20] A general verdict does not provide findings of fact from which an appellate court may independently infer the existence of actual malice.[21] This procedural inadequacy compromises the independent nature of appellate scrutiny mandated by the *Bose* decision.[22]

This Note attempts to resolve the ambiguities surrounding the constitutional mandate of independent appellate review of an actual malice determination. Part I focuses on the nature of appellate review and discusses the differences between the varying standards of review applicable in civil actions. Part II examines *Bose* and addresses the appropriate scope of the independent appellate review mandate. Part III discusses the procedural limitations of de novo review and concludes that special verdicts or special interrogatories accompanying general verdicts should be used to facilitate an appellate court's independent review of the actual malice determination.

I. STANDARDS OF APPELLATE REVIEW

The standard of appellate review dictates how much deference an appellate court pays to the findings made at trial.[23] Typically, the applicable standard depends on whether the issue subject to review is a question of law[24] or a question of fact.[25] Also relevant is whether the issue subject

817 F.2d 762 (en banc), *cert. denied*, 108 S. Ct. 200 (1988). "Discrete," "subsidiary" and "operative" facts are synonymous terms.

The "legal inference" connotes the process of applying the governing law to the historical facts to determine whether actual malice exists in the instant case. *See, e.g.*, McCoy v. Hearst Corp., 42 Cal. 3d 835, 844, 727 P.2d 711, 717, 231 Cal. Rptr. 518, 524 (1986) (en banc), *cert. denied*, 481 U.S. 1041 (1987). This term best describes the law application process since actual malice dissects the publisher's state of mind, which is virtually always proven by circumstantial rather than direct evidence. *See* Dalbec v. Gentleman's Companion, Inc., 828 F.2d 921, 927 (2d Cir. 1987).

18. *See, e.g.*, *McCoy*, 42 Cal. 3d at 842, 727 P.2d at 715, 231 Cal. Rptr. at 522.

19. *See, e.g.*, Connaughton v. Harte-Hanks Communications, Inc., 842 F.2d 825, 842-44 (6th Cir.), *cert. granted*, 109 S. Ct. 257 (1988); Bartimo v. Horsemen's Benevolent & Protective Ass'n, 771 F.2d 894, 898 (5th Cir. 1985), *cert. denied*, 475 U.S. 1119 (1986); Starkins v. Bateman, 150 Ariz. 537, 542-43, 724 P.2d 1206, 1211-12 (Ct. App. 1986).

20. *See* Matheson, *Procedure in Public Person Defamation Cases: The Impact of the First Amendment*, 66 Tex. L. Rev. 217, 276-77 (1987).

21. *See infra* note 111 and accompanying text.

22. *See infra* notes 117-24 and accompanying text.

23. *See* 1 S. Childress & M. Davis, *supra* note 8, § 1.1, at 4.

24. A question of law is general in character and applicable to numerous factual circumstances. *See* Monaghan, *supra* note 17, at 235; *see also* Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C.L. Rev. 993, 994 n.3 (1986) (declarations of law are fact free general principles applicable to all disputes).

to review is initially determined by a judge[26] or a jury.[27] These classifications[28] determine whether an appellate court reviews the issue freely, without regard to the findings made below,[29] or deferentially, setting aside findings below only upon clear error.[30]

Questions of law are usually freely reviewable. For example, the appellate function of declaring the law[31] justifies free review of decisions

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25. *See supra* note 17.

26. In a federal bench trial, Rule 52(a) requires that the trial judge's findings of fact be stated separately from the conclusions of law. *See* Fed. R. Civ. P. 52(a); *see also* Calleros, *Title VII and Rule 52(a): Standards of Appellate Review in Disparate Treatment Cases—Limiting the Reach of* Pullman-Standard v. Swint, 58 Tul. L. Rev. 403, 412 (1983) (discussing requirements of Rule 52(a)). These findings of fact are then subject to Rule 52(a)'s "clearly erroneous" test and can only be set aside on appeal "when although there is evidence to support [the finding], the reviewing court . . . is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). The clearly erroneous standard does not permit a reviewing court to substitute its own judgment for that of the trier of fact simply because the appellate court would have, on the record, decided the issue differently. *See* Anderson v. City of Bessemer, 470 U.S. 564, 573 (1985).

While Rule 52(a) is only applicable to federal cases, many states have similar statutory provisions. *See, e.g.*, Ariz. R. Civ. P. 52(a); Colo. R. Civ. P. 52; Mass. R. Civ. P. 52(a).

27. The seventh amendment provides that "no fact tried by a jury, shall be . . . reexamined in any court of the United States . . . ." U.S. Const. amend. VII. Consequently, an appellate court must deferentially review historical facts found by a jury. *See* Louis, *supra* note 24, at 996 n.19. While the seventh amendment has not been applied through the fourteenth amendment to the states, most state constitutions provide similar protection. *See* James, *Right to a Jury Trial in Civil Actions*, 72 Yale L.J. 655, 655 (1963).

28. The initial classification determines whether the issue will be treated as fact or law. *See* Louis, *supra* note 24, at 998. Professor Monaghan argues that the fact/law determination represents an allocation of functions between fact finder and appellate court regarding the subject at issue. *See* Monaghan, *supra* note 17 at 237-38. Focusing on allocation theory directs attention to the important policy justifications that underlie classifications. *See* Calleros, *supra* note 26, at 418. The Supreme Court has affirmed the importance of policy in the classification decision, in effect adopting Professor Monaghan's allocation theory. *See* Miller v. Fenton, 474 U.S. 104, 113-14 (1985).

29. *See supra* note 8 and accompanying text.

30. The deferential standard of review varies slightly depending upon whether the initial fact adjudicator is a judge or a jury. *See* Louis, *supra* note 24, at 1001-02 ("clearly erroneous" for trial judge findings; "against the clear weight of the evidence" for jury findings). The standards for appellate reversal under each vary, but are slight and incapable of precise articulation. *See id.* at 1002. As a result, many courts making actual malice determinations disregard the distinction, and analyze jury findings under the clearly erroneous standard of review. *See, e.g.*, Connaughton v. Harte-Hanks Communications, Inc., 842 F.2d 825, 841 (6th Cir.), *cert. granted*, 109 S. Ct. 257 (1988) (clearly erroneous standard applied in jury trial).

31. *See* Louis, *supra* note 24, at 1017. The power to declare the law is expansive, including in part:

> [T]he recognition of new common-law claims and defenses, the identification of the legislative purposes of new claims and defenses created by statute, the ascertainment of the essential elements of all claims and defenses, the development of appropriate definitions or tests for these elements, the identification of the factors that may or may not be considered in determining the existence of an essential element, the assignment of the appropriate weight to be given relevant factors, the identification of the party with the burden of proof, the degree of

based on erroneous interpretations of substantive law.[32] Similarly, appellate courts are free to review the sufficiency of the evidence to determine whether the controlling burden of proof has been met.[33]

Historical facts,[34] unlike questions of law, are usually reviewed deferentially[35] because the fact finder is presumably in a superior position to evaluate the credibility of witnesses.[36] An appellate court can review only a cold record, which does not document witness demeanor, and therefore is usually in an inferior position to determine historical facts.[37]

The appropriate standard of review for mixed questions of law and fact is a more difficult problem. Mixed questions exist when the historical facts are established, the rule of law is undisputed, and the question to be resolved is "whether the rule of law as applied to the established facts is or is not violated."[38] The standard of review often turns on practical considerations,[39] such as the relative expertise of the fact finder in handling such questions[40] and the need to ensure a correct result in a particular matter.[41] Consequently, different standards of appellate review have been applied to mixed questions of law and fact.[42]

II. *BOSE CORP. V. CONSUMERS UNION OF UNITED STATES, INC.*

The Supreme Court has not explicitly classified the actual malice determination as a question of fact, a question of law, or a mixed question of law and fact.[43] This lack of clarity has caused confusion in determin-

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proof required, and, when appropriate, the development of presumptions or other guides to decision.

Id. at 1021 (footnotes omitted).

32. *See* Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982). Erroneous jury instructions provide a similar basis for free appellate review. *See* 9 C. Wright & A. Miller, Federal Practice and Procedure § 2558, at 668 (1971).

33. *See* Louis, *supra* note 24, at 1019; 9 C. Wright & A. Miller, *supra* note 32, § 2524, at 541-42.

34. *See supra* note 17.

35. *See* Calleros, *supra* note 26, at 412-13; Louis, *supra* note 24, at 993.

36. *See* Anderson v. City of Bessemer, 470 U.S. 564, 575 (1985); *see also* Calleros, *supra* note 26, at 419 (trial court advantage greatest in evaluating credibility of witnesses); 1 S. Childress & M. Davis, *supra* note 8, § 2.9, at 50 (same). Other justifications for the allocation include inefficient use of judicial resources, *see Anderson*, 470 U.S. at 574-75, and unfairness to parties required to re-litigate factual issues on appeal. *See id.*

37. *See Anderson*, 470 U.S at 575.

38. Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982); *see also* Calleros, *supra* note 26, at 417 (" 'Mixed question of law and fact' is generally defined broadly to refer to the application of a legal rule to historical facts to determine the legal consequences of those facts.").

39. *See* Calleros, *supra* note 26, at 418.

40. *See id.* at 419.

41. *See id.* at 421.

42. *See* Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982); United States v. McConney, 728 F.2d 1195, 1200 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984).

43. In Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984), the Supreme Court flirted with different labels without settling upon a classification. *See* Bezanson, *Fault, Falsity and Reputation in Public Defamation Law: An Essay on* Bose Corporation v. Consumers Union, 8 Hamline L. Rev. 105, 118 (1985). Initially, the

ing the exact scope of independent appellate review of the actual malice determination.[44] This confusion can be eliminated by viewing actual malice as a complex determination[45] consisting of different elements, rather than as a simple and unified concept. The actual malice determination can be separated into two components: adjudication of historical facts[46] and the legal inference[47] of actual malice drawn from those facts. *Bose* provides guidance on how each element should be reviewed on appeal.

A. *The Decision*

Bose was a product disparagement suit[48] involving the defendant's unfavorable review of the Bose 901 loudspeaker system.[49] The review stated that the sound emanating from the speakers tended to "wander

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Court stated that "[i]t surely does not stretch the language of [Rule 52(a)] to characterize an inquiry into what a person knew at a given point in time as a question of 'fact.' " *See Bose*, 466 U.S at 498 (1984). The Court then cited Herbert v. Lando, 441 U.S. 153, 170 (1979), in which it had labeled actual malice an "ultimate fact." *Bose*, 466 U.S. at 498 n.15. Ultimate facts are often equated with mixed questions of law and fact since both imply the application of a legal standard to factual circumstances in disposition of a matter. *See Pullman-Standard*, 456 U.S at 286 n.16.

Later in its opinion, the *Bose* Court highlighted the inapplicability of Rule 52(a) in certain situations, "including those that may infect a so-called *mixed finding of law and fact.*" *Bose*, 466 U.S. at 501 (emphasis added). This language led one commentator to conclude that *Bose* "categorized the actual malice issue as a mixed question of law and fact." Note, *supra* note 5, at 488.

44. *See*, Bezanson, *supra* note 43, at 112; *see also supra* notes 18-19 and accompanying text.

45. The complexity of making the actual malice determination is well documented. "Actual malice" as a term of art distorts the traditional notion of the term "malice," which usually connotes ill-will, hatred or the like. *See* Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341, 1349-50 (S.D.N.Y. 1977); Mahoney v. Adirondack Publishing Co., 71 N.Y.2d 31, 36 n.1, 517 N.E.2d 1365, 1367 n.1, 523 N.Y.S.2d 480, 481 n.1 (1987). Juries have substantial difficulty in grasping the subtle complexity of the legal standard, often misinterpreting the judge's charge on the issue. *See*, Note, *Model Jury Instructions for the "Actual Malice" Standard*, 39 Rutgers L. Rev. 153, 156 (1986). Consequently, there has been a substantial appellate reversal rate of the finding of actual malice in favor of plaintiffs. *See id.* (citing study by Professor Franklin, which found that only 17 percent of jury findings of actual malice were upheld on appeal). This conclusion parallels the reversal rate for all defamation actions. *See* Matheson, *supra* note 20, at 280-81 n.375 (80 percent reversal rate of verdicts against publishers). This reversal rate is most surprising when compared to the traditional rate in normal civil actions, which has been documented at approximately 20 percent. *See* 1 S. Childress & M. Davis, *supra* note 8, § 2.14, at 77 & n.58.

46. *See supra* note 17 and accompanying text.

47. *See id.*

48. The elements of product disparagement are: (1) publication of (2) a false statement (3) which is derogatory of plaintiff's title, property or business in general; (4) which is uttered with some degree of fault; and (5) which causes plaintiff actual and provable pecuniary loss. *See* W. Keeton, Prosser & Keeton on Torts § 128, at 967-70 (5th ed. 1984).

49. *See* Bose Corp. v. Consumers Union of United States, Inc., 508 F. Supp. 1249, 1253 (D. Mass. 1981), *rev'd*, 692 F.2d 189 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984).

about the room."[50] The trial judge concluded that the statement—attributable to defendant's senior engineer, Arthur Seligson—was false[51] and published with actual malice.[52] The Court of Appeals for the First Circuit, following *New York Times Co. v. Sullivan*,[53] conducted an independent review of the district court's actual malice finding.[54] The court concluded that defendant's use of the term "about" to describe the sound movement was, at most, imprecise and did not support a legal inference of actual malice.[55]

The Supreme Court granted certiorari to determine whether Rule 52(a)'s "clearly erroneous" test prescribed the standard of appellate review applicable to a trial court's finding of actual malice.[56] Concluding that it did not,[57] the Court directed appellate judges to decide independently whether actual malice was proved with convincing clarity.[58] The Court reasoned that the important first amendment rights at stake required that the decision not be left solely to the trier of fact.[59] In applying its holding, the Court decided that Bose Corporation had failed to prove that the defendant published with actual malice.[60]

B. *Scope of Review Mandated*

The *Bose* Court did not divide the issue of actual malice into its component elements and assign each an appropriate standard of appellate review.[61] Analysis of each element, however, will help determine the proper scope of the *Bose* mandate.

1. Historical Facts

Historical facts are the case specific circumstances in a particular litigation.[62] They generally are determined by the fact finder, who assesses

50. *See id.*
51. *See id.* at 1268.
52. *See id.* at 1276-77. This finding was based on an evaluation of Seligson's testimony, wherein he claimed that the report referring to sounds that wandered " 'about the room' " actually meant "along the wall." *See id.* at 1276. The trial judge found this testimony not credible, concluding that, as an intelligent person, Seligson could not have meant to assign a definition to the word "about" other than its plain, ordinary meaning. *See id.* at 1277. Therefore, Seligson must have known that his description was false or at least was reckless as to its veracity. *See id.*
53. 376 U.S. 254 (1964).
54. *See* Bose Corp. v. Consumers Union of United States, Inc., 692 F.2d 189, 195 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984). The court of appeals, however, was careful not to disturb the trial judge's credibility determinations. *See id.*
55. *See id.* at 197.
56. *See* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 487 (1984).
57. *See id.* at 514.
58. *See id.* at 511.
59. *See id.* at 501.
60. *See id.* at 514.
61. *See supra* notes 43-44 and accompanying text.
62. *See supra* note 17.

testimonial and documentary, as well as other demonstrative evidence presented at trial.[63] The inability of an appellate court to assess witness demeanor,[64] along with the seventh amendment's guarantee of a jury trial,[65] usually results in a deferential standard of appellate review.[66] In light of *Bose*, however, the standard of review of historical facts found at trial is uncertain.[67]

Most courts have concluded that historical facts underlying the actual malice determination should be deferentially reviewed on appeal.[68] The basis for this conclusion is the *Bose* Court's statement that " 'due regard' shall be given to the trial judge's opportunity to observe the demeanor of the witnesses."[69] This language has been construed to fit *Bose* snugly into the traditional fold which leaves credibility determinations to the

63. "Testimonial evidence" refers to the live testimony of witnesses at trial. *See* Annotation, *Application of "Clearly Erroneous" Test of Rule 52(a) of Federal Rules of Civil Procedure to Trial Court's Finding of Fact Based on Documentary Evidence*, 11 A.L.R. Fed. 212, 215 (1972). The trier of fact evaluates this testimony in part by assessing its credibility. *See id.* "Documentary evidence" refers to all written evidence which can be assessed by both the trial court and appellate court with equal competency. *See id.* Such evidence includes "depositions, affidavits, stipulations of fact or testimony, transcripts of other trials, official or business records, and the like." *Id.* "Demonstrative evidence" is an inclusive term that refers to "all phenomena which can convey a relevant firsthand sense impression to the trier of fact." C. McCormick, McCormick on Evidence § 212, at 663 (E. Cleary 3d ed. 1984). The term normally refers to tangible items of evidence such as weapons, items of apparel and the like. *See id.*

64. *See supra* note 36 and accompanying text.

65. *See* U.S. Const. amend VII; *see also* Connaughton v. Harte-Hanks Communications, Inc., 842 F.2d 825, 842 n.10 (6th Cir.) (describing seventh amendment rights of litigants in light of *Bose*), *cert. granted*, 109 S. Ct. 257 (1988); *supra* note 27 and accompanying text (discussing relationship between seventh amendment and deferential standard of review).

66. *See supra* notes 34-37 and accompanying text.

67. The majority of cases have concluded that, under *Bose*, historical facts retain their traditional status and are deferentially reviewed on appeal. *See, e.g.*, Connaughton v. Harte-Hanks Communications, Inc., 842 F.2d 825, 842 (6th Cir.), *cert. granted*, 109 S. Ct. 257 (1988); Zerangue v. TSP Newspapers, Inc., 814 F.2d 1066, 1071 (5th Cir. 1987); Bartimo v. Horsemen's Benevolent and Protective Ass'n, 771 F.2d 894, 898 (5th Cir. 1985), *cert. denied*, 475 U.S. 1119 (1986); Tavoulareas v. Piro, 759 F.2d 90, 109 (D.C. Cir. 1985), *rev'd on other grounds*, 817 F.2d 762 (en banc), *cert. denied*, 108 S. Ct. 200 (1987); Starkins v. Bateman, 150 Ariz. 537, 542, 724 P.2d 1206, 1211, (Ct. App. 1986); Wanless v. Rothballer, 115 Ill. 2d 158, 169-70, 503 N.E.2d 316, 321 (1986), *cert. denied*, 482 U.S. 929 (1987); Brown v. K.N.D. Corp., 7 Conn. App. 418, 430, 509 A.2d 533, 540 (1986), *rev'd on other grounds*, 205 Conn. 8, 529 A.2d 1292 (1987).

At least one court, sitting en banc, has interpreted *Bose* as empowering appellate courts to review de novo the historical facts which form the basis of the actual malice determination. *See* McCoy v. Hearst Corp., 42 Cal. 3d 835, 843-45, 727 P.2d 711, 716-18, 231 Cal. Rptr. 518, 523-25 (1986) (en banc), *cert. denied*, 481 U.S. 1041 (1987). In addition, at least one other judge has articulated an analysis, in dictum, which would lead to a similar conclusion. *See* Tavoulareas v. Piro, 759 F.2d 90, 148-49 (D.C. Cir. 1985) (Wright, J., dissenting) (historical facts should be narrowly defined so as to freely review most issues in actual malice determination), *rev'd on other grounds*, 817 F.2d 762 (en banc), *cert. denied*, 108 S. Ct. 200 (1987).

68. *See supra* note 67.

69. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499-500 (1984).

trier of fact.[70] *Bose*'s own application of its mandate for de novo review has been cited as support for this conclusion.[71] The Court accepted the historical fact that Seligson was not credible in his explanation concerning the words "about the room."[72] The Court did not re-examine the historical facts, but instead concluded from those facts that actual malice was absent.[73]

A closer examination of the *Bose* decision, however, suggests a preferable conclusion: the standard of review applicable to historical facts varies depending upon the particular controversy. In this respect, historical facts in public person defamation cases should be treated similarly to mixed questions of law and fact.[74] This conclusion is based on the Court's recognition that the need for correct results, as the justification for appellate review, determines the appropriate standard in a given context.[75] Historical facts entrenched in credibility determinations normally

70. *See, e.g., Tavoulareas*, 759 F.2d at 108; *Starkins*, 150 Ariz. at 543, 724 P.2d at 1212.

71. *See, e.g., Tavoulareas*, 759 F.2d at 107; *Starkins*, 150 Ariz. at 543, 724 P.2d at 1212.

72. The Court stated: "We may accept all of the purely factual findings of the District Court and nevertheless hold as a matter of law that the record does not contain clear and convincing evidence that Seligson or his employer prepared the loudspeaker article with [actual malice]." *Bose*, 466 U.S. at 513.

However, in McCoy v. Hearst Corp., 42 Cal. 3d 835, 727 P.2d 711, 231 Cal. Rptr. 518 (1986) (en banc), *cert. denied*, 481 U.S. 1041 (1987), the court maintained that *Bose* did not blindly accept the historical fact that Seligson was not a credible witness, but rather "salvag[ed it] . . . from the heap of disbelief and reinterpret[ed] its constitutional import." *Id.* at 845, 727 P.2d at 717, 231 Cal. Rptr. at 524. The court relied on the fact that *Bose* analyzed Seligson's testimony in two different manners. First, the constitutional sufficiency of discredited testimony was evaluated. *See id.* at 844-45, 727 P.2d at 717, 231 Cal. Rptr. at 524 ("The high court also noted the existence of the normal rule that testimony disbelieved by the trier of fact 'is not considered a sufficient basis for drawing a contrary conclusion.' ") (quoting *Bose*, 466 U.S. at 512). Second, the Court made its own credibility assessment regarding Seligson's testimony, concluding that he merely displayed his capacity for "rationalization" rather than his knowledge of the statement's falsity. *See McCoy* at 844-45, 727 P.2d at 717, 231 Cal. Rptr. at 524 (citing *Bose*, 466 U.S. at 512).

73. *See Bose*, 466 U.S. at 513.

74. This is not to say, however, that historical facts are mixed questions, because historical facts concern only those elements of the actual malice determination that are determined prior to the application of any legal principle. *See supra* note 17. Nonetheless, the line between historical facts and mixed questions is not bright, and can shift depending upon the substantive area of law at stake. *See* Tavoulareas v. Piro, 759 F.2d 90, 148 (D.C. Cir. 1985) (Wright, J., dissenting) ("The *Bose* Court emphasized the delicate judgments involved and the necessity of giving a narrow reading to the realm of pure fact in certain circumstances."), *rev'd on other grounds*, 817 F.2d 762 (en banc), *cert. denied*, 108 S. Ct. 200 (1987). The result of such an interpretation accords with the judgment that traditionally defined historical facts should take on new meaning in the actual malice context, and deserve free review on appeal. *See id.* at 148 n.4.

75. The *Bose* Court recognized this principle by relying on Baumgartner v. United States, 322 U.S. 665, 670-71 (1944):

> The conclusiveness of a "finding of fact" depends on the nature of the materials on which the finding is based. The finding even of a so-called "subsidiary fact" may be a more or less difficult process varying according to the simplicity or

receive deferential review because of the presumption of correctness attached to trial disposition of the matter.[76] The standard of review, however, potentially becomes broader as this presumption weakens.[77] This is especially true when correct adjudication is essential because the decision has substantial social significance.[78]

Two factors help justify de novo appellate review of the historical facts central to the actual malice determination.[79] First, jury bias against media defendants plagues the accuracy of findings in defamation cases.[80] The extraordinary appellate reversal rate in public person defamation suits evidences the deficiency of such jury determinations.[81] Second, ap-

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> subtlety of the type of "fact" in controversy. Finding so-called ultimate "facts" more clearly implies the application of standards of law. And so the "finding of fact" even if made by two courts may go beyond the determination that should not be set aside here. Though labeled "finding of fact," it may involve the very basis on which judgment of *fallible* evidence is to be made. Thus, the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of "fact" that precludes consideration by this Court.

Bose, 466 U.S at 500 n.16 (quoting *Baumgartner*, 322 U.S. at 670-71) (emphasis added).

Some courts have drawn the opposite conclusion, concluding that the Court's willingness to distinguish between subsidiary and ultimate facts indicates its philosophy that the former should receive deferential review whereas the latter should receive de novo review. *See, e.g.*, Connaughton v. Harte-Hanks Communications, Inc., 842 F.2d 825, 841-42 (6th Cir.), *cert. granted*, 109 S. Ct. 257 (1988). This analysis, however, fails to take into account the context in which the distinction was drawn.

76. *See* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 500 (1984).

77. *See id.* at 500.

78. *See id.* at 500 n.16 (quoting *Baumgartner*, 322 U.S. at 670-71). The social significance of correct adjudication of the actual malice determination is substantial and therefore cannot be left to the sole discretion of the trier of fact. *See Bose*, 466 U.S. at 503-05.

79. *Cf.* Matheson, *supra* note 20, at 282 ("Greater appellate scrutiny of the record in public person defamation cases to ensure correct determinations of actual malice should serve the aims of *accurate fact finding* and rule application.") (emphasis added). However, Professor Matheson concludes that such procedural accuracy will be sacrificed if the appellate court alters jury findings of subjective facts subject to credibility determinations. *See id.*

80. *See* Rosenblatt v. Baer, 383 U.S. 75, 95 (1966) (Black, J., concurring); *see also* Oakes, *Proof of Actual Malice in Defamation Actions: An Unsolved Dilemma*, 7 Hofstra L. Rev. 655, 710 (1979) (actual malice allows trier of fact to discriminate against unpopular ideas and unpopular plaintiffs). It should be noted that Justice Black, however, was not convinced that the solution to these pressures was independent appellate review of the record. *See Rosenblatt*, 383 U.S. at 95. Recent Court opinions on the issue, however, disagree with Justice Black's conclusions. Justice Rehnquist, who dissented from the *Bose* majority, conceded the point: "[A]ny doctrine of 'independent review' of facts exists . . . so that perceived shortcomings of the trier of fact by way of bias or some other factor may be compensated for." *Bose*, 466 U.S. at 518 (Rehnquist, J., dissenting) (footnote omitted). The Supreme Court has recently affirmed this conclusion in another context. *See* Miller v. Fenton, 474 U.S. 104, 114 (1985) (quoting then Justice Rehnquist in *Bose* to support independent appellate review in involuntary confession cases). Some commentators, pointing to other shortcomings of appellate judges, argue that appellate review will not overcome the problems of fact finder bias. *See* Matheson, *supra* note 20, at 274.

81. *See supra* note 45 and accompanying text. Judge Bork explained the rationale for appellate reversal in such a situation:

pellate court competency to make credibility determinations is greater in certain instances than in others. When historical facts are anchored in documentary evidence,[82] take the form of uncontroverted testimony[83] or are buttressed by other non-testimonial evidence in the record,[84] the appellate court's adjudicatory competence is substantially increased. Together, these two factors shift the presumption of correctness to the appellate level, thereby justifying de novo review of historical facts relevant to the actual malice decision.

De novo review of historical facts implicates the parties' seventh amendment rights to a jury trial.[85] *Bose*, however, indicates that free review is permissible in spite of the seventh amendment when historical facts must be analyzed in order to decide the constitutional question at issue.[86] The seventh amendment is based on the belief that twelve repre-

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> The evidence is mounting that juries do not give adequate attention to limits imposed by the first amendment and are much more likely than judges to find for the plaintiff in a defamation case. It is appropriate for judges, therefore, to take cases from juries when they are convinced that a statement ought to be protected because . . . it . . . is inherently unsusceptible to accurate resolution by a jury.

Ollman v. Evans, 750 F.2d 970, 1006 (D.C. Cir. 1984) (en banc) (Bork, J., concurring), *cert. denied*, 471 U.S. 1127 (1985).

82. *See* Levine & Salans, *Exceptions to the Clearly Erroneous Test After the Recent Amending of Rule 52(a) for the Review of Fact Based Upon Documentary Evidence*, 10 Am. J. Trial Advoc. 409, 411 (1987); 1 S. Childress & M. Davis, *supra* note 8, § 2.9, at 55-56. *Bose* itself recognized that the presumption of correctness to be afforded the trial judge in cases involving documentary evidence is far less than in cases involving witness demeanor. *See Bose*, 466 U.S. at 500; *id.* at 519 (Rehnquist, J., dissenting). De novo review of the actual malice determination has been supported on such a basis. *See, e.g.*, McCoy v. Hearst Corp., 42 Cal. 3d 835, 846 n.8, 727 P.2d 711, 718 n.8, 231 Cal. Rptr. 518, 525 n.8 (1986) (en banc), *cert. denied*, 481 U.S. 1041 (1987).

83. *See, e.g.*, Speer v. Ottaway Newspapers, Inc., 828 F.2d 475, 478 (8th Cir. 1987) (undisputed evidence supported judgment that defendant did not publish with actual malice), *cert. denied*, 108 S. Ct. 1247 (1988); *cf.* Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1284 (7th Cir. 1977) (within confines of clearly erroneous rule, appellate court has more discretion to review undisputed testimony).

84. *See, e.g.*, *Speer*, 828 F.2d at 475. In *Speer*, a claim that a police officer used undue force in an arrest was substantiated by evidence of physical injuries and damaged property. *See id.* at 476. This physical evidence buttressed the actual malice finding. *See id.*

85. *See supra* notes 27, 65 and accompanying text. The applicability of the seventh amendment to the actual malice determination, however, has been questioned. *See* Levine, *Judge and Jury in the Law of Defamation: Putting the Horse Behind the Cart*, 35 Am. U.L. Rev. 3, 40-43 (1985). This murky issue is predicated upon the nature of the seventh amendment, which only guarantees the right to a jury trial in cases at law which existed at the time of the amendment's passage in 1791. *See* Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935). The peculiar common law development of the law of defamation leaves substantial doubt as to the role of the jury in such actions in 1791, especially because the jury was not empowered to enter a general verdict in a civil slander action or to determine guilt or innocence in a criminal libel action until the passage of the Fox Libel Act in 1792. *See* Levine, *supra*, at 41 & n.176.

86. *Cf.* Bose v. Consumers Union of United States, Inc., 466 U.S. 485, 508-09 n.27 (1984) ("[R]eview of findings of fact is appropriate 'where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.'" (quoting Fiske v. Kansas, 274 U.S. 380, 385-86 (1927))).

sentatives of the community, applying collective wisdom gained from the "mainsprings of human conduct,"[87] can deduce historical facts better than a single judge.[88] This rationale loses force, however, when the stakes of the cases are substantial enough to warrant vesting appellate courts with ultimate responsibility over the matter.[89] At stake in public person defamation litigation are the fundamental first amendment values protected by the actual malice requirement.[90] Because of the need to safeguard these values from local prejudice,[91] corrective de novo review is justified in spite of the seventh amendment.

2. Legal Inference of Actual Malice

Once the historical facts are determined, the law is applied[92] to determine whether actual malice has been established with convincing clarity.[93] This mixed question of law and fact[94] is best described as the legal inference of actual malice.[95] The legal inference must be distinguished from a decision of legal sufficiency, where an appellate court merely decides whether the evidence at trial is sufficient to lead a reasonable person to conclude that actual malice is present.[96] De novo review requires sub-

87. Commissioner v. Duberstein, 363 U.S. 278, 289 (1960).

88. *See* Sioux City & Pac. R.R. v. Stout, 84 U.S. (17 Wall.) 657, 664 (1873); Parker, *Free Expression and the Function of the Jury*, 65 B.U.L. Rev. 483, 493 (1985); Levine, *supra* note 83, at 43.

89. As the Court stated:

> At some point, the reasoning by which a fact is "found" crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment. Where the line is drawn varies according to the nature of the substantive law at issue. Regarding certain largely factual questions in some areas of the law, the *stakes*—in terms of impact on future cases and future conduct—are too great to entrust them finally to the judgment of the trier of fact.

Bose, 466 U.S. at 501 n.17 (emphasis added).

90. *See id.* at 503-04.

91. *See* Levine, *supra* note 85, at 28-32. Levine argues that prior to *Bose*, press defendants were subject to a frontal attack of substantial plaintiff libel awards and spiraling litigation costs 20 years after the establishment of the actual malice standard. *See id.* The causes of press self-censorship were attributable, in part, to jury hostility toward media defendants. *See id.* at 29 n.121 ("[As one federal judge noted,] a jury . . . may 'well permit its verdict to reflect its disapproval of the views espoused by the defendants or its frustration with the state of world or national affairs reported by the press generally.' " (quoting Kaufman, *The Media and Juries*, N.Y. Times, Nov. 4, 1982, at A27, col. 3)); *see also* note 80 and accompanying text (discussing jury bias in defamation cases).

92. *See* Louis, *supra* note 24, at 993-94 n.3, 1003.

93. *See* Tavoulareas v. Piro, 759 F.2d 90, 150 (D.C. Cir. 1985) (Wright, J., dissenting), *rev'd on other grounds*, 817 F.2d 762 (en banc), *cert. denied*, 108 S. Ct. 200 (1987).

94. Law application is a mixed question of law and fact because it involves taking the historical facts and attaching legal significance to them. *See supra* note 38 and accompanying text.

95. *See supra* note 17 and accompanying text.

96. *See* Monaghan, *supra* note 17, at 235-36; *see also* Louis, *supra* note 24, at 1017 (supervisory power of appellate courts evaluates legal sufficiency of evidence to determine whether trial finding exceeds discretion conferred). Since New York Times Co. v. Sulli-

stantially more: appellate courts must independently decide whether actual malice exists based on the historical facts determined at trial.[97]

The appropriate standard of appellate review regarding the legal inference depends upon the policies underlying the substantive law at issue.[98] The *Bose* Court concluded that the legal inference of actual malice is freely reviewable on appeal.[99] Thus, an appellate court must independently evaluate the historical facts in order to make its own legal inference regarding the existence of actual malice.[100]

The Court offered two substantive grounds for this conclusion.[101] Initially, the Court noted that de novo review performs an essential corrective function. By correcting erroneous and biased trial judgments, de novo review protects the fundamental first amendment values[102] safeguarded by the actual malice standard.[103]

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van, courts have spent immeasurable time and energy determining what evidence is legally sufficient to prove actual malice. *See generally* Note, *supra* note 45, at 178-96 (survey of facts Supreme Court has found sufficient to prove actual malice). Three generalizations seem evident. First, certain evidence lacks any probative value, and can never be a basis, either alone or in conjunction with other facts, for an actual malice determination. *See, e.g.*, Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 n.18 (1971) (ill will or hatred not probative); Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6, 10 & n.3 (1970) (same); St. Amant v. Thompson, 390 U.S. 727, 733 (1968) (failure to perceive consequences of publication not probative); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (caustic and vehement tone not probative). Second, evidence lacking sufficient probative value to prove actual malice may be considered sufficient when viewed in conjunction with other probative evidence. *See Tavoulareas*, 759 F.2d at 114. For example, failure to investigate alone is insufficient to prove actual malice. *See St. Amant*, 390 U.S. at 733. Lower courts, however, have held that failure to investigate, coupled with defendant's lack of deadline pressure, can be "grossly inadequate in the circumstances" and thus constitute actual malice. *See* Hunt v. Liberty Lobby, 720 F.2d 631, 645 (11th Cir. 1983) (quoting Vandenburg v. Newsweek, Inc., 441 F.2d 378, 380 (5th Cir.), *cert. denied*, 404 U.S. 864 (1971)). Last, certain evidence is so probative of defendant's state of mind that it alone may establish defendant's actual malice. *See St. Amant*, 390 U.S. at 732. In Tavoulareas v. Piro, 759 F.2d 90 (D.C. Cir. 1985), *rev'd*, 817 F.2d 762 (en banc), *cert. denied*, 108 S. Ct. 200 (1987), both the panel and en banc majorities agreed that an editorial memorandum, highlighting the improbability of the veracity of a story, could alone establish actual malice with convincing clarity, though both courts disagreed about the legal inference to be drawn in the particular case. *See id.* at 114-17; *Tavoulareas*, 817 F.2d at 793-94.

97. *See* Monaghan, *supra* note 17, at 241-42.

98. *See supra* notes 39-42 and accompanying text.

99. *See* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 514 (1984); *see also* Levine & Salons, *supra* note 82, at 422 (*Bose* mandated de novo review).

100. *See* Monaghan, *supra* note 17, at 242.

101. The Court also cited the common-law heritage of actual malice, which afforded judges broad discretion in the law application process, as a basis for its conclusion. *See Bose*, 466 U.S. at 502. This historical idiosyncracy provides little principled guidance to justify the rule, and therefore has been dismissed as unimportant in properly understanding the Court's rationale. *See* Monaghan, *supra* note 17, at 242-43.

102. *See Bose*, 466 U.S. at 503-04.

103. *See id.* at 510. Professor Monaghan, despite his reservations concerning the mandate for de novo review, nonetheless agrees with this conclusion. *See* Monaghan, *supra* note 17, at 272-73.

The Court did not mention the equally important concern regarding jury inability to master the nuances of the actual malice concept. *See, e.g.*, R. Smolla, Suing the Press 182-

The Court also based its conclusion on the need for case-by-case adjudication to provide substance to the actual malice standard.[104] This rationale deserves more consideration than it has received.[105] Case-by-case adjudication to define the contours of the actual malice definition performs a central appellate court function: to determine the limits between protected and unprotected speech under the first amendment.[106] Repeated independent appellate review of the actual malice determination adds "flesh to the bones" of the actual malice concept, aiding in substantive law development.[107]

By identifying the appellate corrective function as the basis for its holding, the *Bose* Court harmonized review of historical facts with review of the legal inference of actual malice. Instead of casting the actual malice determination as a traditional adjudication in which appellate courts act only to declare the law, *Bose* established procedural safeguards

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97 (1986) (chronicling jury confusion regarding the actual malice standard in Tavoulareas v. Washington Post Co., 567 F. Supp. 651 (D.D.C. 1983), *rev'd on other grounds sub nom.*, Tavoulareas v. Piro, 759 F.2d 90 (D.C. Cir. 1985), *rev'd*, 817 F.2d 762 (D.C. Cir. 1987) (en banc), *cert. denied*, 108 S. Ct. 200 (1987)); *see also supra* note 45 (noting complexity of actual malice determination).

104. *See Bose*, 466 U.S. at 502. This rationale, as the Court noted, gains support from previous Supreme Court decisions on the actual malice rule. *See id.* at 503 (quoting St. Amant v. Thompson, 390 U.S. 727, 730-31 (1968)).

105. *See* Monaghan, *supra* note 17, at 242-43. While Professor Monaghan agrees with the Court's rationale, arguing that case-by-case adjudication of factually similar circumstances provides guidance as to the meaning of the actual malice standard, *see id.* at 273, he disagrees with the Court's conclusion that such reasoning mandates independent appellate review in every case. Rather, he suggests such power should be discretionary and applied with tempered judgment, *see id.* at 271, because law application is not a normative process, and affects only the parties to the litigation. *See id.* at 236. That is, in order for there to be a constitutional requirement for independent appellate review, each case must define the contours between protected and unprotected speech through development of principles of general applicability. *Cf. id.*

Bose, however, argues against this reasoning. The Court cited Justice Harlan's opinion in Roth v. United States, 354 U.S. 476, 497-98 (1957), arguing that in the obscenity context, each particular expression has potential constitutional value, and therefore, each writing deserves the protection of independent review. *See Bose*, 466 U.S. at 506-07 n.25. As a result, every case " 'involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind.' " *Id.* at 507 n.25 (quoting *Roth*, 354 U.S. at 497-98). Even if Professor Monaghan is correct, and law application extinguishes norm elaboration, it still does not follow that independent appellate review should be used sparingly. Each application of the actual malice definition provides insight into the meaning of the rule, and therefore guidance to future judicial law declaration and law application. *See* Calleros, *supra* note 26, at 423-24.

106. *See Bose*, 466 U.S. at 503. This function has been performed in numerous first amendment contexts, including defamation, fighting words, incitement to riot, obscenity and child pornography. *See id.* at 504. In such situations, "the Court has regularly conducted an independent review of the record . . . to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Id.* at 505.

107. *See* Calleros, *supra* note 26, at 423-24. Professor Calleros' conclusion regarding mixed questions is analogous to that of the *Bose* Court, and indicates the symmetry between the policy approach to mixed questions and the approach employed in *Bose*. *See supra* notes 39-42.

to ensure correct results in public person defamation actions. As a result, appellate courts, when competent,[108] may resolve material historical facts.[109] In addition, appellate courts are required to decide for themselves whether the established facts prove by clear and convincing evidence that the defendant acted with actual malice.[110]

III. PROCEDURAL CONCERNS REGARDING INDEPENDENT APPELLATE REVIEW

A. *Limitations on Independent Appellate Review*

The *Bose* Court recognized the importance of correct adjudication of public person defamation actions, but did not establish procedures to accomplish the result. General jury verdicts do not reveal factual findings from which independent appellate inferences can be drawn.[111] Therefore, in cases where deference to such findings is required,[112] appellate courts are in a quandary as to how to perform their mandated constitutional duty.[113] Two equally unappealing alternatives exist: appellate courts either defer to the actual malice inference drawn at trial and merely evaluate the sufficiency of the evidence,[114] or they manufacture[115] possible jury findings.[116] Both procedures compromise the independent nature of appellate review and eviscerate the protection of the *Bose* decision.

Limiting *Bose* to an evaluation of legal sufficiency occurs most often in appellate review of motions for judgment notwithstanding the verdict (JNOV).[117] These courts maintain that *Bose* does not affect the traditional JNOV standard, which requires an appellate court to draw all rea-

108. *See supra* notes 82-84 and accompanying text.

109. *See supra* notes 74-84 and accompanying text.

110. *See supra* notes 99-100 and accompanying text.

111. *See* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 517-18 n.1 (Rehnquist, J., dissenting); *see also* Monaghan, *supra* note 17, at 236 (law application is buried in the jury's general verdict).

112. *See supra* note 68 and accompanying text.

113. *See* Matheson, *supra* note 20, at 276.

114. *See, e.g.*, McAvoy v. Shufrin, 401 Mass. 593, 598, 518 N.E.2d 513, 517 (1988); Richmond Newspapers, Inc. v. Lipscomb, 234 Va. 277, 295, 362 S.E.2d 32, 42 (1987), *cert. denied*, 108 S. Ct. 1997 (1988); *see also infra* notes 117-20 and accompanying text.

115. *See* Amicus Brief of American Society of Newspaper Editors for Appellant at 8, Harte-Hanks Communications, Inc. v. Connaughton, *cert. granted*, 109 S. Ct. 257 (1988) (No. 88-10).

116. *See, e.g.*, Connaughton v. Harte-Hanks Communications, Inc., 842 F.2d 825, 843 (6th Cir.), *cert. granted*, 109 S. Ct. 257 (1988); Starkins v. Bateman, 150 Ariz. 537, 543, 724 P.2d 1206, 1212 (Ct. App. 1986); Holbrook v. Casazza, 204 Conn. 336, 338, 528 A.2d 774, 775 (1987), *cert. denied*, 108 S. Ct. 699 (1988); Tosti v. Ayik, 394 Mass. 482, 492, 476 N.E.2d 928, 935 (1985), *cert. denied*, 108 S. Ct. 453 (1987).

117. *See, e.g.*, Dalbec v. Gentleman's Companion, Inc., 828 F.2d 921 (2d Cir. 1987); Tavoulareas v. Piro, 759 F.2d 90 (D.C. Cir. 1985), *rev'd on other grounds*, 817 F.2d 762 (en banc), *cert. denied*, 108 S. Ct. 200 (1987); *Starkins*, 150 Ariz. at 537, 724 P.2d at 1206; *Holbrook*, 204 Conn. at 336, 528 A.2d at 774; *Tosti*, 394 Mass. at 482, 476 N.E.2d at 928.

sonable inferences most favorably to the non-movant.[118] This appellate deference, however, violates the central purpose of *Bose*: appellate courts must act to correct erroneous but reasonable legal inferences of actual malice made at trial.[119] To implement the *Bose* mandate properly, independent appellate review must replace the traditional JNOV standard of review.[120]

Courts that attempt to draw independent inferences from manufactured trial findings likewise fall short of the *Bose* mandate. When an appellate court reviews a general verdict, it presumes that the jury found every issue in favor of the prevailing party.[121] As a result, when the rec-

118. *See, e.g., Tavoulareas*, 759 F.2d at 106; *Starkins*, 150 Ariz. at 540, 724 P.2d at 1209; *Tosti*, 394 Mass. at 491, 476 N.E.2d at 935.

A similar standard has been employed by courts that have interpreted *Bose* deciding motions for summary judgment. *See, e.g.*, Zerangue v. TSP Newspapers, Inc., 814 F.2d 1066, 1071 (5th Cir. 1987); Dombey v. Phoenix Newspapers, Inc., 150 Ariz. 476, 486, 724 P.2d 562, 572 (1986); Perez v. Scripps-Howard Broadcasting Co., 35 Ohio St. 3d 215, 218, 520 N.E.2d 198, 202, *cert. denied*, 109 S. Ct. 179 (1988). These courts have based their decisions on dictum from Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). In *Liberty Lobby*, the Court held that, in motions for summary judgment, judges "must view the evidence presented through the prism of the substantive evidentiary burden" of proof applicable in the context. *Id.* at 254. The Court was quick to point out, however, that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." *Id.* at 255. In a motion for summary judgment or directed verdict, this deference makes sense because disputed factual issues have yet to be resolved by the jury. As *Liberty Lobby* points out, "[this decision] by no means authorizes trial on affidavits." *Id.* However, in a motion for JNOV, the jury has already resolved the factual issues, and the trial judge is making an independent inference regarding the existence of actual malice pursuant to the *Bose* mandate. *See* Tavoulareas v. Piro, 759 F.2d 90, 147 (D.C. Cir. 1985) (Wright, J., dissenting), *rev'd on other grounds*, 817 F.2d 762 (en banc), *cert. denied*, 108 S. Ct. 200 (1987).

There is room for disagreement, however, concerning the *Liberty Lobby* dictum. One commentator has argued that the implication of *Bose* is that judges must draw their own inferences in the summary judgment motion context. *See* Levine, *supra* note 85, at 72.

Viewing summary judgment as separate from the *Bose* mandate, however, does not denigrate the substantial protection still afforded defendants under *Liberty Lobby*. Plaintiff's pre-trial evidentiary basis must show that a genuine issue of material fact exists. *See Liberty Lobby*, 477 U.S. at 247. Materiality requires that the evidence be sufficient to prove actual malice by clear and convincing evidence. *See id.* at 257. This substantial burden is difficult for a plaintiff to overcome. For example, the Court of Appeals for the Second Circuit recently affirmed a grant of summary judgment for the New York Times Company, making a painstaking review of plaintiff's evidence under *Liberty Lobby* and concluding that, as a matter of law, it was legally insufficient to prove an inference of actual malice. *See* Contemporary Mission, Inc., v. New York Times Co., 842 F.2d 612, 627 (2d Cir.), *cert. denied*, 109 S. Ct. 145 (1988).

119. *See Tavoulareas*, 759 F.2d at 147 (Wright, J., dissenting).

120. *See* Speer v. Ottaway Newspapers, Inc., 828 F.2d 475, 476-77 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 1247 (1988); *Tavoulareas*, 817 F.2d at 805 (Wald, C.J., concurring); Pemberton v. Birmingham News Co., 482 So. 2d 257, 259-60 (Ala. 1985).

121. *See* Holbrook v. Casazzo, 204 Conn. 336, 336, 528 A.2d 727, 779 (1987). This standard has been expropriated from the traditional state law standard of deferential review of trial findings. *See, e.g.*, DeWitt v. Brown, 669 F.2d 516, 523 (8th Cir. 1982); Gold v. National Sav. Bank of Albany, 641 F.2d 430, 434 (6th Cir.), *cert. denied*, 454 U.S. 826 (1981). Federal law on the matter is similar. *See* 5A Moore's Federal Practice ¶

ord reflects dispute regarding material facts, an appellate court must manufacture jury findings most supportive of the verdict, and then attempt an independent review.[122] This procedure eliminates the independent nature of the inquiry. The legal inference of actual malice, drawn from facts viewed most favorably to the prevailing party, normally confirms the jury's verdict.[123] If reversal occurs, the jury probably made a definite and firm mistake that could be corrected as easily under the deferential standard of review.[124] In either case, the unique protection afforded by *Bose* vanishes.

B. *Procedural Recommendations*

Bose focused on the importance of correct adjudication of an actual

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50.02[1], at 50-27 (2d ed. 1988). As a result, whether state or federal law is applied is of little concern. *See id.* ¶ 50.06, at 50-49.

122. *See, e.g.*, Connaughton v. Harte-Hanks Communications, Inc., 842 F.2d 825, 843 (6th Cir.), *cert. granted*, 109 S. Ct. 257 (1988); Starkins v. Bateman, 150 Ariz. 537, 543, 724 P.2d 1206, 1212 (Ct. App. 1986); *Holbrook*, 204 Conn. at 337-42, 528 A.2d at 775-77; Tosti v. Ayik, 394 Mass. 482, 491-92, 476 N.E.2d 928, 935 (1985), *cert. denied*, 108 S. Ct. 453 (1987).

Connaughton presents the most glaring example of this procedure. This case concerned a local municipal judgeship election. The defendant had accused the plaintiff, a candidate for office, of fraudulently procuring and disseminating scurrilous information against his opponent. The plaintiff contended that the accusation was published with actual malice because it was false, based on slanted reporting in favor of his opponent, and procured through faulty journalistic practices that relied on an inherently improbable and emotionally distraught source. *See Connaughton*, 842 F.2d at 831-37. Defendant countered the charge, stating that it had remained impartial throughout the ordeal and that no legitimate reason existed to doubt the veracity of its source. *See id.* at 837. In reviewing the jury verdict for the plaintiff, the Court of Appeals for the Sixth Circuit concluded that the jury could have found eleven facts, which, when cumulated, proved actual malice with convincing clarity. *See id.* at 843-44. Each finding concerned disputed facts which the court, in accordance with traditional procedure, viewed most favorably toward the plaintiff. *See id.* After reviewing the eleven findings for clear error, the court then attempted to make its own inference regarding the existence of actual malice. *See id.* at 844-47. Predictably, the court's conclusion affirmed the jury verdict for plaintiff. *See id.* at 847.

123. *See, e.g.*, *Connaughton*, 842 F.2d at 847; *Starkins*, 150 Ariz. at 549, 724 P.2d at 1218; *Holbrook*, 204 Conn. at 361, 528 A.2d at 786; *Tosti*, 394 Mass. at 494, 476 N.E.2d at 936.

124. *See, e.g.*, Richmond Newspapers, Inc. v. Lipscomb, 234 Va. 277, 289-95, 362 S.E.2d 32, 38-42 (1987) (resolving all disputed facts and inferences in favor of plaintiff and still holding, as a matter of law, that evidence was insufficient to support proof of actual malice), *cert. denied*, 108 S. Ct. 1997 (1988). This is not to say, however, that courts have been unable to perform an independent review without documented findings made below. *See, e.g.*, Mahoney v. Adirondack Publishing Co., 71 N.Y.2d 31, 39-40, 517 N.E.2d 1365, 1369, 523 N.Y.S.2d 480, 483-84 (1987) (judgment that evidence supported legal inference of actual malice reversed because appellate court disagreed with legal inference drawn from established historical facts). It is important to note, however, that the case turned on established and undisputed historical facts. *See id.* As a result, the court did not have to face the problem of determining the jury's resolution of the historical facts in order to make an independent inference from them.

malice claim.[125] Because general verdicts deny appellate courts the opportunity to engage in meaningful and corrective independent appellate review,[126] public person defamation defendants have been denied the effective constitutional safeguard established by *New York Times Co. v. Sullivan*[127] and reinforced in *Bose*.

The solution to this problem lies at the trial level. Trial judges should avoid the use of simple general verdicts to resolve the complex issues involved in actual malice determinations. Rather, Federal Rule of Civil Procedure 49[128] should be employed to require a special verdict[129] or a general verdict accompanied by special interrogatories.[130] Both procedures would document jury findings regarding the material aspects of a defamation suit, thereby remedying the problems that have plagued independent appellate review.

1. Special Verdicts

Under Rule 49(a), a trial judge may order the jury to return a special verdict on factual issues which the court deems material to the matter.[131] The breadth of the issues presented to the jury is discretionary, ranging from a few broad questions to numerous and specific queries.[132] The

125. *See supra* notes 75-78 (correctness critical in review of historical facts); 102-03 (correctness critical in review of legal inference) and accompanying text.

126. *See supra* notes 111-24 and accompanying text. This problem, of course, is evident only in cases tried by a jury since, at a bench trial, Rule 52(a) requires a trial judge to detail in writing findings of fact as well as conclusions of law. *See* Fed. R. Civ. P. 52(a); *supra* note 26 and accompanying text.

127. 376 U.S. 254 (1964)

128. Rule 49 provides for discretionary application of a trial judge's authority to order either a special verdict or general verdict accompanied by special interrogatories. *See* Fed. R. Civ. P. 49; 9 C. Wright & A. Miller, *supra* note 32, § 2505, at 492; *id.* § 2511, at 522. Numerous states have similar provisions authorizing use of special verdicts. *See* Lipscomb, *Special Verdicts Under the Federal Rules*, 25 Wash. U.L.Q. 185, 190-91 (1940). In fact, the federal rule was conceived in contemplation of similar state practices existing at the time. *See id.* This Note focuses on the federal rule.

129. Rule 49(a) provides in pertinent part:

> The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence . . . .

Fed. R. Civ. P. 49(a).

130. Rule 49(b) provides in pertinent part: "The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict." Fed. R. Civ. P. 49(b).

131. *See* 9 C. Wright & A. Miller, *supra* note 32, § 2506, at 499. Those issues which can be categorized as matters of law should be resolved by the trial judge. *See id.* at 500-01.

132. *See id.* at 500. Most federal courts have used a few broad questions of fact that help resolve only ultimate issues of fact. *See id.* In the actual malice context, the questions presented should be sufficiently detailed to provide a reviewing court with an understanding of how and why the jury resolved the matter as it did.

form of the questions presented to the jury can vary as well.[133] The trial judge then applies the governing legal principles to the factual matters submitted for consideration and enters judgment.[134]

Using a special verdict in the actual malice determination has significant advantages. For example, questions presented to the jury can cover material aspects of the actual malice determination. Armed with a detailed record, an appellate court has a basis for making its own determination whether the facts prove actual malice with clear and convincing evidence.[135]

By establishing a procedural safeguard at the trial level, special verdicts would also further *Bose*'s concern that the actual malice determination be made correctly. Special verdicts focus jury attention exclusively on fact determinations,[136] thereby substantially reducing juror bias and caprice.[137] Moreover, because law application is reserved exclusively for the court, the difficulty jurors have in grasping the subtleties of the actual malice standard[138] would be eliminated.[139]

Although the use of a special verdict under Rule 49(a) does present some problems and limitations, the advantages of their use outweigh the drawbacks. The most significant problem is that special verdicts require a trial judge to submit numerous questions to the jury in order to resolve all the factual issues in a complex action.[140] A common fear is that omissions of important factual queries would be a frequent basis for reversal.[141] Omissions may, however, be cured in a number of ways. For example, under the rule an omitted issue is deemed to be waived by the potentially prejudiced party.[142] In addition, even if an omitted issue

133. *See id.* § 2510, at 514 (including yes/no answers, written detail of findings or other appropriate form); *see, e.g.*, Rowland v. Mad River Local School Dist., 730 F.2d 444, 456-60 (6th Cir. 1984) (utilizing hybrid procedure of yes/no inquiries and conditional questions requiring written explanation), *cert. denied*, 470 U.S. 1009 (1985).

134. *See* Brown, *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 338, 343 (1967); Wright, *The Use of Special Verdicts in Federal Court*, 38 F.R.D. 199, 199 (1966).

135. *See* Brown, *supra* note 134, at 346-48. (special verdict provides record for appellate review); Lipscomb, *supra* note 128, at 214 (same). While neither of these commentators refers to the process of independent appellate review, the advantage to the appellate court in evaluating legal sufficiency is the same in the de novo review context.

136. *See supra* notes 131, 134 and accompanying text.

137. Because jurors are unaware of the legal effects of their decisions, bias and other extraneous factors are eliminated from the decision-making process. *See* 9 C. Wright & A. Miller, *supra* note 32, § 2503, at 488; Lipscomb, *supra* note 128, at 213; Wright, *supra* note 134, at 201.

138. *See supra* note 45 and accompanying text.

139. *See* Tavoulareas v. Piro, 817 F.2d 762, 808 (D.C. Cir.) (en banc) (Ginsburg, R., J., concurring), *cert. denied*, 108 S. Ct. 200 (1987); *see also* Wright, *supra* note 134, at 202 (special verdicts especially advantageous in complex cases). The premise of this conclusion is that judges will be better able to clearly and precisely apply the complex actual malice standard to historical facts. *See* Note, *supra* note 5, at 490-91 n.96 (appellate review enhances correctness of judgment).

140. *See* Lipscomb, *supra* note 128, at 207.

141. *See* Wright, *supra* note 134, at 200.

142. *See* Fed. R. Civ. P. 49(a); *see also* Wright, *supra* note 134, at 200 (explaining Rule

would cause prejudice, the rule allows the trial judge to make a finding in substitution of the jury.[143]

Even without the rule's self-corrective device, however, the problem of omission seems negligible in the actual malice context. Under *Bose*, a jury has ultimate authority only over factual disputes which involve testimonial credibility determinations.[144] This relatively small number of issues[145] would not encumber the trier of fact and would not be difficult for the trial judge to administer.

A second concern regarding the use of special verdicts is that they eliminate the jury as a moderating influence upon rigid legal rules and therefore reduce the flexibility necessary to temper law with justice.[146] This argument loses force in the actual malice context. Juries have been a major cause of erroneous judgments through biased and capricious decision making.[147] As a result, first amendment values require the procedural safeguard of independent appellate review[148] to lessen jury discretion and authority.

2. Special Interrogatories

An alternative to the special verdict is Federal Rule of Civil Procedure 49(b). Under this rule, the trial judge submits special interrogatories to the jury on issues of relevant fact.[149] Unlike the special verdict, Rule 49(b) requires the jury to retain the responsibility of law application.[150]

Special interrogatories check improper general verdicts and focus fact finder attention on pertinent factual issues.[151] Both functions aid *Bose*'s concern for correct results in actual malice determinations. By documenting factual findings, appellate courts are freed from the limitations on independent appellate review.[152] Moreover, by focusing the fact finder's attention on fact resolution, special interrogatories minimize the

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49(a)). The potentially prejudiced party may solve this problem by making a motion for resolution before the jury retires. *See id.*

143. *See id.*

144. *See supra* notes 79-84 and accompanying text. Documentary, uncontroverted and physically supported evidence all provide bases for a court—especially an appellate court—to adjudicate historical facts. *See id.*

145. *See* Levine, *supra* note 85, at 71 n.336 (most actual malice cases do not turn on disputed issues of material fact).

146. *See* Parker, *supra* note 88, at 551. This philosophy is based on the fact that juries have historically acted as guardians, rather than inhibitors, of free expression. *See id.* at 496-500. In the actual malice context, this theory has been cited as a basis for allowing juries to adjudicate all factual issues. *See* Levine, *supra* note 85, at 76-77.

147. *See supra* note 80 and accompanying text.

148. *See* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 510-11 (1984).

149. *See* 9 C. Wright & A. Miller, *supra* note 32, § 2511, at 521.

150. *See* Note, *The Case for Interrogatories Accompanying a General Verdict*, 52 Ky. L.J. 852, 858 (1964).

151. *See* 9 C. Wright & A. Miller, *supra* note 32, § 2511, at 521; Parker, *supra* note 88, at 552.

152. *See supra* notes 111-24 and accompanying text.

effect of factors such as juror bias.[153]

Rule 49(b), however, is less appealing than Rule 49(a) because special interrogatories leave the law application process in the hands of the fact finder.[154] As a result, juror confusion regarding the meaning of the actual malice standard[155] will remain a substantial problem. Additionally, jury answers to interrogatories might be inconsistent with the rendered general verdict.[156] In such a situation, the trial judge has several options under Rule 49(b), including an order for further deliberations, an order for a new trial or judgment on the answers to the interrogatories.[157] This problem does not arise with use of a special verdict since the judge controls the application of the law to the facts.

CONCLUSION

Independent appellate review of the actual malice determination in public person defamation actions has been firmly established by the Supreme Court. However, the Court has not precisely defined the scope of that review, nor has it established procedures to make true independent review feasible. *Bose* indicates that the primary function of de novo review is to guarantee correct results in order to protect the fundamental first amendment values at stake in defamation litigation. Therefore, appellate review should expand in scope as long as accuracy is enhanced. Federal Rule of Civil Procedure 49 is a particularly useful medium to accomplish this goal and further the Court's constitutional concerns.

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153. *See* Note, *supra* note 150, at 856-57.
154. *See id.*
155. *See supra* note 45.
156. *See* 9 C. Wright & A. Miller, *supra* note 32, § 2513, at 526. There is also the possibility that the answers to the interrogatories will be inconsistent with each other. *See id.* This presents little problem, however, as long as the answers are consistent with the general verdict. *See id.*
157. *See id.* at 526-27.